UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Andrew R. Mallory, Appellant,

v.

United States of America, Appellee.

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Criminal Law; Confession McNabb Rule; Right of Jury to Known About Indeterminate Sentence Law In Rape Case

No. 12,915. Decided June 28, 1956.

Appeal from the United States District Court for the District of Columbia. Affirmed.

PRETTYMAN, Circuit Judge: Appelant was indicted, tried and convicted on a charge of rape. The jury added to the verdict the death penalty.

Three points should be discussed. The first point concerns a confession. The rape occurred at about six o'clock in the evening on April 7, 1954, in the furnace room in the basement of the apartment house where the complaining witness lived. The assailant was masked. The janitor's quarters were also in the basement and were occupied by the janitor and his wife, two grown sons, and a younger son. Appellant Mallory, a half brother of the janitor, had also been living in the janitor's quarters for about six weeks prior to the day of the crime. The investigating police officers suspected Mallory and his two grown nephews. Mallory and one of the nephews had left the place immediately after the crime. Mallory was found and arrested at about two-thirty on the afternoon following the crime, April 8th. He and the two nephews were taken to police headquarters and questioned for a short time. At some time after four o'clock all three agreed to take lie detector tests. Some delay occurred while the officer in charge of the polygraph was located. During this interval a meal was served to the three men, no further interrogation occurring during this time. Until the lie detector tests began the three men were together. They were examined one after the other, the two nephews first, and finally, at about eight o'clock, the officer began his examination of Mallory. At about nine-thirty Mallory admitted guilt, describing in detail what had occurred, and immediately thereafter he repeated his account to two other officers. Sometime after ten o'clock the police

telephoned the home of the United States Commissioner. That official was not available. At ten-forty-five Mallory was given a physical examination by a deputy coroner and was found to be in good physical condition. Mallory told this officer he had no complaints to make, except for a slight cold; he said he had not been struck or threatened and no promises had been made. At about eleven o'clock he was confronted by the complaining witness. Between eleven-thirty, p.m., and twelve-thirty, a.m., he dictated his confession to a stenographer, who typed it. This typewritten document was admitted in evidence at the trial.

Mallory says his confession was inadmissible under the so-called McNabb rule. We have discussed this rule in recent cases. We think the confession in the case at bar was properly admitted. The delay which occurred between the arrest and the confession was not unreasonable. The police had three suspects, and it is inconceivable that they should be required to lodge charges against any suspect until their investigation has developed with some certainty a justification for charges; provided always that the investigation is not unduly prolonged. Moreover there is no evidence that the confession was due to the delay, such as it was.

The second point concerns a statement made by the court to the jury. After the jury had been deliberating several hours it sent a note to the court. It asked, first, whether it had any choice of verdicts other than the four upon which it had been instructed, i.e., guilty with the death penalty, guilty as charged, not guilty by reason of insanity, or not guilty. The second question was:

> On No. 2 above: Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release --

The court said:

> I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is 30 years, but even if the Court imposes the maximum, and of course I can, even if the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term that the Court can impose would be an indeterminate sentence of 10 to 30 years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything less than the maximum.
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> So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged.

The third request of the jury was for a reading of the code respecting rape. The judge read the statute which provides that the penalty for rape shall be imprisonment for not more than thirty years, with a proviso that the jury may add to a verdict of guilty the words "with the death penalty".

It is strongly, and with reasonable basis, urged upon us that the above-quoted statement of the trial judge was error. It is said that in the first place a possible sentence, other than the death sentence, was of no concern to the jury, and that in the second place the statement permitted the jury to select the death sentence by comparison with other possible sentences although the jury had before it no data upon which it could evaluate such other sentences. The statement, appellant urges, enabled the jury to fix the death penalty because it did not want the defendant subject to release under any circumstances at the end of ten years. It is argued that the jury should have been required to make its determination as to the death sentence solely upon the basis of data before it, that is, upon the basis of the facts concerning the crime itself.

It is true that imposition of sentence by a judge under modern procedure and the imposition of sentence by a jury rest upon different bases. When a jury fixes the sentence for a crime it must do so upon the basis of the information before it. That information consists of the evidence presented during the trial and so is limited to data which is relevant and material to the alleged crime. Hence, when a jury is required to pass upon the death penalty, it must do so upon the basis of evidence concerning the crime itself. But, when a federal judge in modern times imposes sentence after a jury verdict, he has before him a presentence report, which contains the prior criminal record, if any, of the defendant and information about his characteristics, financial condition, and circumstances affecting his behaviour. Thus in modern penology the element of rehabilitation looms large. The judge chooses the sentence to be imposed upon the basis of much material other than that relating to the crime itself. A jury, under present procedure, cannot make a choice upon that basis.

Forceful though we think the foregoing considerations to be, we think appellant's argument cannot be sustained. Unlike the situation in the ordinary case, the jury had a serious responsibility in respect to punishment for this crime. They had a right to know what the law is upon that punishment. Thus, clearly, they had a right to know that the punishment other than death is imprisonment for not more than thirty years. But the phrase in this statute -- "for not more than thirty years" -- is not the whole of the law upon the matter; standing alone it is not an accurate reflection of the law. A minimum sentence is required, and parole applies. The trial judge did not more than state accurately the whole law

in respect to punishment for this crime. He did not attempt to forecast what might happen or to elaborate in any way. He did no more than state the law upon the point, and the point was one for the jury in this case. We think the jury was not remiss in seeking to know the alternative sentences as an aid to an intelligent decision upon the problem imposed upon them by the statute; i.e., whether the death sentence was the proper imposition. We think the trial judge was not in error when in response to the request he gave the jury accurately the whole of the law respecting punishment for this offense.

Mallory's third point is that the admission into evidence of articles of clothing worn by him at the time of the alleged crime was error. He relies on Nelson v. United States and Judd v. United States.

Immediately after Mallory signed a confession officers questioned him about his clothing. He told them it was in the janitor's apartment, which adjoined the furnace room where the rape occurred. He gave written permission to go to the apartment and get the clothes and accompanied two officers on that errand. The shorts, coat, shirt and trousers bore seminal stains.

Mallory argues that his consent to the search was not clearly shown to have been without duress or coercion. We think it was, and, moreover, the consent was an immediate accompaniment to a confession of the crime and derives color from the confession. In Judd and Nelson no confession was involved. Here, since Mallory had already confessed to the crime itself, in the absence of evidence to the contrary his express consent to the taking of specific property involved in the crime must be treated as being of the same voluntary nature. We find no error in this respect.

The judgment of the District Court will be affirmed.

BAZELON, Circuit Judge, dissenting: I cannot agree with the court's conclusions that (1) a proper answer was given to the jury's inquiry as to whether a sentence of imprisonment would assure appellant's confinement for the rest of his natural life; and (2) the admission in evidence of the confession was proper under the McNabb rule.

(NOTE: The dissent does not object to polygraph interrogation but merely to interrogation during illegal detention.)

SECRET

CASES AND MATERIAL PERTAINING TO THE ADMISSIBILITY

IN THE COURTS OF POLYGRAPH EVIDENCE

22 Tennessee Law Review (February 1953). "The Polygraphic Truth Test - A Symposium." This series of articles reprinted from the Tennessee Law Review contains numerous citations to court decisions pertaining to the problem of the admissibility of polygraph evidence.

People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (Oct. 1955). Denial of defendent's request for admission in evidence of polygraph report.